Supreme Court, U.S.
FILED
OCT 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LIEU B. HOANG

Petitioner,

V.

U.S. OFFICE OF PERSONNEL MANAGEMENT
LORETTA CORNELIUS
DEFENSE LOGISTICS AGENCY
Lt. Gen. D.M. BABERS

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LIEU B. HOANG
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REVISED EDITION

QUESTIONS PRESENTED FOR REVIEW

1. *Whether there was a question mark.*

2. *Whether the Plaintiff was denied a fair proceedings and was prejudiced against as the District Court repeatedly refused to rule on any of Plaintiff's procedural motions such as Motion to Rule on Motion for an Order Compelling the Clerk to enter (Defendants' second) Default, Motion for an order Compelling the Request for Production, Motion to strike, Motion to Reconsider, etc. while it not only immediately ruled on all Defendants' motions but also accepted and considered Defendants' materials submitted after the filing Deadline for Cross-Motions for Summary Judgement.*

3. *Whether the District Court erred and abused its discretion in accepting, granting and considering Defendants materials submitted after the mutual filing deadline on Cross-Motions for Summary Judgment, and without first extended the mutual filing deadline.*

4. *Whether the District Court erred and abused its discretion in denying Plaintiff's Motion for Summary Judgment and in granting Defendants' Cross-Motion for Summary Judgment that based solely on Defendants' inadmissible evidence and immaterial disputed facts.*

5. *Whether an argument presented by a Co-Counsel for Defendants who failed to file a written appearance as required by local rule and then as the Court's order could be considered in ruling on Cross-Motions for Summary Judgment.*

6. *Whether the District Court erred and abused its discretion in setting aside Defendants' default by rule 55(e) of Federal Rules of Civil Procedure as:*

(a) *Defendants had never, even on their Motions to Dismiss or Set Aside Default, moved the Court to set aside default because of rule 55(e) of F.R.C.P.*

(b) *Case law*, Alameda v. Secretary of HEW, *622 F. 2d. 1044 (1st Cir. 1980), has held that rule 55(e) does not relieve the government from duty to defend cases or obey Court's order.*

7. *Whether the Clerk of the District Court could refuse to enter Defendants' (second) default as she took the Defendants' sides and the District Court erred and abused its discretion in refusing to rule on the Plaintiff's Motion for an Order Compelling the Clerk to enter Defendants' (second) default.*

8. *Whether the Defendants had to file an Answer to the Complaint at all during sixteen (16) months of litigation, especially when they no longer had any excuse for not filing an Answer to the Complaint.*

9. *Whether default Judgement should be granted in favor of the Plaintiff and against the Defendants as the Defendants' election to stand on their Motion for Summary Judgment and their refusal to answer the Complaint.*

PARTIES TO PROCEEDINGS BELOW

– Lieu B. Hoang, Petitioner herein, filed this civil action in the United States District Court for the Northern District of Indiana on July 18, 1986; appealed the District Court's erroneous decision to the United States Court of Appeals for the Seven Circuit on November 6, 1987.

– United States Office of Personnel Management, Respondent herein, was a Defendant and Appellee below. Also named as Defendants and Appellees were Loretta Cornelius, Director of U.S. Office of Personnel Management, Defense Logistics Agency and its director Lt. Gen. D. M. Babers.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Lieu B. Hoang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Mr. Lieu B. Hoang
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OPINIONS BELOW

1. The District Court's opinion is attached on page 14 as Appendix 2.

2. The Court of Appeals for the Seventh Circuit's opinion is attached on page 23 as Appendix 3.

3. None of the opinions of the Courts below was reported or published.

JURISDICTION

1. The Order and Opinion of the United States Court of Appeals was entered on April 4, 1989.

2. Petition for Rehearing with Suggestion in Banc was timely filed on April 17, 1989.

3. The timely filed Petition for Rehearing with Suggestion in Banc was denied on May 11, 1989.

4. Application for Extension of Time within which to file Petition for Writ of Certiorari was filed on August 8, 1989.

5. Application for Extension of Time within which to file Petition for Writ of Certiorari was granted on August 9, 1989, by Justice John Paul Stevens, extending the time to and including October 8, 1989 which was Sunday and the following day was Columbus day so the deadline for filing Petition for Writ of Certiorari was Tuesday, Oct. 10, 1989.

6. The Jurisdiction of this court is invoked under 28 United States Code, section 1254 (1).

STATUTORY PROVISION INVOLVED

28 United States Code, section 1331 and pursuant to title VII of the Civil Rights Act of 1964, section 717, as amended by the Equal Employment Opportunity Act, 42 United States Code, section 2000e-16.

STATEMENT OF THE CASE

This civil action arose from the intentionally repeated mis-ratings of the Petitioner's score for an open competitive position of Contract Administrator (1) even after the submission of the U.S. validated credential for the foreign university which the Petitioner attended (as the Respondents should have requested before the ratings) (2) that cost the Petitioner many job opportunities, and by the Respondents' own admission (3) of their prejudicial "erroneous judgmental decision" as they believed that there was no way the Petitioner could be as good as an American who was born and educated in the United States, so the Petitioner was always intentionally given the scores as low as possible which were never good enough to be gainfully employed.

To avoid such prejudicial treatments, on June 1985, when the Petitioner filled in the job application standard form 171, he purposely did not type the address of Saigon University - School of Law in and abbreviated that name to "S.U. - School of Law" (4) to make the U.S. Office of Personnel Management's (OPM) and Defense Logistics Agency (DLA) raters think that S.U. - School of Law was somewhere in the United States so that the Petitioner would be given the same and equal score with other American educated applicants. It worked perfectly that their raters did not know "S.U. - School of Law" was a foreign law school so they did not request for a report of foreign education evaluation service (2) nor did they request for additional information or the address (5) of Saigon University. That was OPM's first evaluation as of July 1985.

If the Petitioner's name was James Smith, he would have been given a maximum and highest score because of his outstanding educational background. Instead, his name

---

(1) Advertised by the Respondents in the Fort Wayne Journal Gazette on June 2, 1985.

(2) As instructed by the OPM Guidelines for Evaluation.

(3) OPM letter of May 30, 1986 to Petitioner written by George Becker which is now in the court records for appeal.

(4) See Appendix 1 on page 13.

(5) As requested by the information printed on the application Standard Form 171.

was Lieu B. Hoang where OPM raters had a "question mark on their minds as the Petitioner was a foreigner" that he was given a low score of 87.5 for grade GS-9 and even unqualified for grade GS-11.

On August 1985, along with submitting of the U.S. validated credential, the Petitioner requested for re-evaluation as the Respondents then knew that the Petitioner was a naturalized citizen of the United States who was born in Vietnam and was educated at the University of Saigon - School of Law. On November 15, 1985, the Petitioner was still given a very low score of 90.0 for grade GS-9 and 80.0 for grade GS-11. The Petitioner again requested for re-re-evaluation.

On May 30, 1986, the Petitioner was again given a low score (if compared with other scores of other American educated applicants who had the same qualifications and equivalent educational backgrounds) for the third re-evaluation of 92.5 for grade GS-9 and 82.5 for grade GS-11. By then, the Respondent (OPM) admitted their prejudicial *"erroneous judgmental decision"* on their letter of May 30, 1986 to the Petitioner(3) and to avoid a civil action against them they also stated that they *"sincerely regret the fact that you* (the Petitioner) l*ost opportunity to be considered for federal employment"* because of those mis-ratings, and that, as a remedy, the Petitioner was given priority employment consideration: The Petitioner's name was entered at the head of the GS-11 Contract Administration register so when the next appropriate vacancy is reported for competitive certification, the petitioner's name would precede those of all other eligibles on the certificate to be issued for employment consideration. But its Co-Respondent, the Defense Logistics Agency (DLA), already cancelled the filling of such vacancy for Contract Administrator GS-11 position (6) to prevent the Petitioner from being certified for such vacancy with the pretext that it was just an anticipation of future hiring needs that did not materialized or simply there was no opening.

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(6) Defense Logistics Agency's memorandum.

On July 16, 1986, the Petitioner filed this civil action against the U.S. Office of Personnel Management and its Director, Loretta Cornelius, along with the Defense Logistics Agency and its Director Lt. Gen. D. M. Babers.

On September 10, 1986, the Respondents, by Assistant U.S. Attorney David H. Miller, filed a Written Appearance but had failed to file an Answer to the Complaint on or before the deadline so default was entered against the Respondents. The Respondents failed to request the Court to set aside the default because of rule 55(e) of Federal Rules of Civil Procedure but, on December 23, 1986, the District Court set aside the Respondents' default pursuant to rule 55(e) although rule 55(e) does not relieve the government from the duty to defend cases such as answering the complaint: *Alameda v. Secretary of HEW*, 622 F.2d 1044 (1st Cir. 1980).

Although all services of process were so properly made to the Respondents that an assistant U.S. attorney already filed a written appearance on their behalf, the Respondents still falsely claimed that there were no or improperly services as an excuse for refusing to answer the complaint and to comply with the request for production so on April 21, 1987, the Petitioner re-serviced the services of process with notice to all parties to see if the Respondents would answer the complaint and comply with the request for production. On July 1, 1987, the Petitioner again moved for the second default against the Respondent pursuant to *Hummel v. Wells Petroleum Co.*, 111 F.2d 883 (7th Cir. 1940) as the Respondents elected to stand on their Cross-Motion for Summary Judgment instead of answering the complaint. But the Clerk of the District Court took the Respondents' side and refused to enter the default against the Respondents. The District Court, in turn, also even refused to rule on Petitioner's Motion for an Order Compelling the Clerk to enter (Respondent's second) default and Motion for default judgment. Instead, it granted the Respondents' Cross-Motion for Summary Judgment and denied the Petitioner's Motion for Summary Judgment as it

believed the Respondents' false argument that the Petitioner simply could not get the job because he failed to complete his job application (by failing to state the address of his law school . . . although the mis-ratings kept happening after the submission of U.S. validated credential which showed the name and address of the Petitioner's law school) that there was no genuine issue of material fact in dispute, and that sooner or later the Petitioner would get the job because of his name being placed on the list for priority employment consideration as a remedy for the repeated mis-ratings, etc.

Following the District Court's erroneous decision of denying the Petitioner's Motion for Summary Judgment and of granting the Respondents' Cross-Motion for Summary Judgment, the Co-Respondent (DLA) thought it was safe to show its real face of discrimination by vindictively removing the Petitioner's name not only on the priority employment consideration list but also on the eligibility list. As a result, the Petitioner will never be certified for such position like the District Court thought when it denied the Petitioner's Motion for Summary Judgment and granted the Respondent's Cross Motion.for Summary Judgement.

EXISTENCE OF JURISDICTIONS BELOW

1. The District Court's jurisdiction: 28 U.S.C. § 1331.

2. Court of Appeals' jurisdiction: 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS AFFIRMED THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA'S DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS AND EVEN ITS OWN PRIOR DECISION ON THE SAME MATTERS:

A. Generally, while other District Courts would render the decisions that based on the facts and/or evidence, the District Court for the Northern District of Indiana, by judge Allen Sharp who personally dislikes the Petitioner, has rendered its decision that based on a lie, a perjured testimony and false argument from the Respondents. The District Court falsely stated on the Facts finding section of its Memorandum and Order (Please see Appendix 2 on page 15) that:

"The application was clear and very precise except that Hoang failed to put the addresses of the university and law school he attended as required by instructions printed on the application form. Because the rater did not know where the school was located, he placed a question mark on that part of the application and Hoang was not given credit for his education when he was assigned his rating."

Which, evidently, was not true. The rater did not place any question mark on that part of the application (see Appendix 1 on page 13. That was the copy attached in the Respondents' briefs filed with both District Court and the Court of Appeals to be transferred to the Supreme Court for its inspection upon granted this Petition for Writ of Certiorari). The Respondents did not even have the "Questions mark idea" until after June 16, 1986 (the filing date of this litigation). And if Hoang's education was not considered, he was also rated as not even qualified for grade GS-9 (7).

The Court of Appeals, in turn, blindly "rubber stamped" the District Court's erroneous decision without first looking at the physical evidence (Appendix 1 on page 13) to see if there was indeed any question mark at all. The Court of Appeals also falsely stated on its order (Please see Appendix 3 on page 24 that:

"Hoang first applied to be Contract Administrator (GS-11) in June 1985. Unfortunately, on his application,

(7) Job description and minimum requirements for Contract Administrator position.

he neglected to provide the addresses of his undergraduate university and law school. This oversight led the DCASR rater to place a question mark on the application (apparently indicating that the rater was unable to determine whether Hoang had attended accredited institutions). Consequently, Hoang's educational credentials were not considered in fixing his ratings at 87.5 for a GS-9 position and unqualified for GS-11 position."

When this material fact about the fictitious question mark on the education part of the application was misapprehended by the Courts below like that, the points of law were overlooked and the course of the war was changed in favor of the perjured Respondents. The Petitioner was falsely blamed for not getting the job because of the fictitious negligence which is the pretext for employment discriminations which was covered up with a fictitious question mark that the Courts below could not see through. Therefore, under the landmark cases of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Courts below could barely see there was a Prima Facie case of discrimination under Title VII that:

1. The Petitioner belong to a minority (Vietnamese).

2. He applied and was qualified for a job for which the employer was seeking applications.

3. He was rejected despite his qualifications, and

4. After his rejection, the employer continued to seek the same qualified applicants.

The Courts below did not even bother to look at the physical evidence to see that there was no question mark like the Respondent had perjured themselves which is the cover up of the pretext for discrimination as the intentional repeated mis-ratings of the Petitioner's score so other applicants could get the jobs, then the cancellations of filing

vacancies for Contract Administrator GS-11 positions when the Petitioner's name was placed on the priority employment consideration as a remedy for losing job opportunities because of the repeated mis-ratings; and since the District Court's erroneous decision of denying the Petitioner's Motion for Summary Judgment and of granting the Respondents' Cross-Motion for Summary Judgment, the Respondent (DLA) has openly shown their real faces of discriminations by removing the Petitioner's name not only from the priority employment consideration list but also from the eligibility list as well.

B. Specifically, the Court of Appeals erroneously affirmed the District Court's erroneous decision on the following aspects:

1. Setting aside the Respondents' default by rule 55(e) of Federal Rules of Civil Procedure (Even if the Respondents did not request the District Court to set aside their default because of rule 55(e) which is in conflict with the prior decision of the first Circuit Court of Appeals on the following case: *Alameda v. Secretary of HEW*, 622 F.2d 1044 (1st Cir. 1980) with the excuse that the Petitioner had not established his claim or right to relief by the evidence satisfactory to the Court although it conceded that the Petitioner did make a Prima Facie case of discrimination (see Appendix 2 on page 17). Both the District Court and the Court of Appeals were so incompetent to see through the Respondents' "fictitious question mark" doesn't mean that the Petitioner has failed to establish his claim or right to relief by the evident satisfactory to the Supreme Court of the United States. Therefore, the Supreme Court must see it for itself whether there was a question mark. (See Appendix 1 on Page 13.)

2. Accepting, granting and considering the Respondents' materials submitted after the mutual filing deadline on Cross-Motions for Summary Judgment, and without first extended the mutual filing deadline which is in conflict with not only the prior decision of the 11th Circuit Court of

Appeals on the following case: *Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988) but also with its own prior decisions on the following cases: *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985); *Freidel v. City of Madison*, 832 F.2d 965 (7th Cir. 1987) with the following logical excuse:

"*Had the district court refused to consider the uncertified exhibits and denied the defendants' motion for summary judgement the defendants could simply have re-filed the motion, submitting certified copies. Thus Hoang was not prejudiced by the district court's decision to allow the defendants to substitute the exhibits.*"

If that was the case, the Petitioner could have re-filed his motion for Summary Judgment too after the Respondents had complied with his request for productions or he could have moved for continuance of the Cross-Motions for Summary Judgment pursuant to rule 56(f) of Federal Rules of Civil Procedure until the Respondents had complied with the request for productions. Thus by the same logical excuse of the Court of Appeals, the Petitioner was indeed prejudiced by the District Court's erroneous decision. Furthermore granting Summary Judgement in favor of the Defendant without first ruling on the Plaintiff's motion for compel discovery is in conflict with the decision of the 11th Circuit Court of APpeals on the following case: *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F.2d 865 (11th Cir. 1988).

3. Denying the Petitioner's Motion for Default Judgment against the Respondents as the Respondents' election to stand on their Cross-Motion for Summary Judgment and their refusal to answer the complaint and comply with the request for productions which is in conflict with its prior decision of the following case: *Hummel v. Wells Petroleum Co.*, 111 F.2d 883 (7th Cir. 1940) without any explanation or even just an excuse; and the prior decision of the First Circuit of Appeals for the following case: *Alameda v. Secretary of HEW*, 622 F.2d 1044 (1st Cir. 1980).

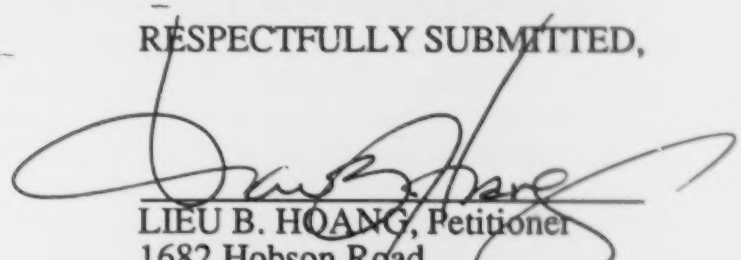
CONCLUSION

For the reasons discussed above, Review by this Honorable court is necessary to avoid the significant implications and contradictions of the decisions of the Court of Appeals. Petitioner respectfully submits that his Petition for a Writ of Certiorari be granted so that this honorable court could find out by itself whether there was a question mark.

– If there was a question mark so cite the Petitioner for contempt of Court.

– If there wasn't a question mark so reverse the Court of Appeals for the Seventh Circuit's decision and to grant triple damages to the Petitioner because the Courts are not a place for the Respondents to lie, perjure, and deceive.

RESPECTFULLY SUBMITTED,



LIEU B. HOANG, Petitioner
1682 Hobson Road
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(219) 422-1631

IN THE

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OCTOBER TERM, 1989

LIEU B. HOANG

Petitioner,

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ON WRIT OF CERTIORARI TO THE
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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

LIEU B. HOANG
1682 HOBSON ROAD
FORT WAYNE, INDIANA 46805
(219) 422-1631

EDUCATION

25 Did you graduate from high school? *If you have a GED high school equivalency or will graduate within the next nine months, answer "YES".*

YES [X] If "YES", give month and year of graduation: June 18, 1966

NO [ ] If "NO", give the highest grade you completed: _____

26 Write the name and location (city and state) of the last high school you attended: Christian Highschool, S.G., So. VI.

27 Have you ever attended college or graduate school? YES [X] If "YES", continue with 28. NO [ ] If "NO", go to 31.

28 NAME AND LOCATION (city, state and ZIP code) OF COLLEGE OR UNIVERSITY. *If you expect to graduate within nine months, give the month and year you expect to receive your degree.*

	MONTH AND YEAR ATTENDED		NO. OF CREDITS COMPLETED		TYPE OF DEGREE (e.g. B.A., M.A.)	YEAR OF DEGREE
	From	To	Semester Hours OR Quarter Hours			
1) National Institute, Sch. of Administration.	9/1966	5/1970	128		B.S.	1970
2) S.U. - School of law	8/1971	5/1974	95		J.D.	1974
3)					L.L.D.	

29 CHIEF UNDERGRADUATE SUBJECTS *Show major on the first line*

	NO. OF CREDITS COMPLETED Semester Hours OR Quarter Hours	
1) Business Administration	30	
2) Personnel Management	26	
3) Financial Management	25	

30 CHIEF GRADUATE SUBJECTS *Show major on the first line*

	NO. OF CREDITS COMPLETED Semester Hours OR Quarter Hours	
1) Civil law	42	
2) Criminal Law	28	
3) other	25	

31 Have you completed any other courses or training related to the kind of jobs you are applying for *(for example, trade, vocational, Armed Forces, or business)*? YES [ ] If "YES", give the information requested below. *(More courses?—Use a sheet of paper)* NO [X] If "NO", go to 32.

MONTH AND YEAR TRAINING COMPLETED	TOTAL CLASSROOM HOURS	SUBJECT(S)	NAME AND LOCATION OF SCHOOL (City, state, and ZIP code, if known)	CERTIFICATE, DIPLOMA, etc. (if any)
1)				
2)				
3)				

SPECIAL SKILLS, ACCOMPLISHMENTS AND AWARDS

32 List your special qualifications, skills or accomplishments that may help you get a job. *Some examples are: skills with machines; most important publications (do not submit copies); public speaking and writing experience; membership in professional or scientific societies; patents or inventions; etc.*

APPENDIX 1

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

LIEU B. HOANG,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. F 86-268
	)	
U.S. OFFICE OF PERSONNEL MANAGEMENT; DEFENSE LOGISTICS AGENCY; LORETTA CORNELIUS, Director of Office of Personnel Management; D. M. BABERS, Lt. General, Director of Defense Logistics Agency,	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

This Title VII employment discrimination action was brought to this court on the basis of federal question jurisdiction under 28 U.S.C. §1331.

Plaintiff Lieu B. Hoang (Hoang) alleges that he was the target of discrimination based on national origin in a hiring decision by the federal government.

The government claims it had valid, non-discriminatory reasons for not hiring Hoang.

The cause is now before this court on cross-motions for summary judgment. For the reasons set forth below, summary judgment is hereby GRANTED in favor of the defendants.

Facts

Lieu B. Hoang is a U.S. citizen, born and raised in South Vietnam. He attended the National Institute in Saigon from 1966-70, graduating Summa Cum Laude. He attended Saigon University School of Law from 1971-74, achieving all A's and graduating Summa Cum Laude. Because the program was based on the French Civil Law System and not the English Common Law System, Mr. Hoang is not permitted to practice law in the United States. However, his law degree is recognized as equivalent to a U.S. law degree.

From 1975-78 Mr. Hoang worked for Gordon Corp. of California, an electronic manufacturing firm, first as a production manager and then as a contract administrator. When the company went bankrupt, Hoang became a free-lance writer. He first applied for the position of Contract Administrator for the U.S. government in June, 1985. The application was clear and very precise except that Hoang failed to put the addresses of the university and law school he attended as required by the instructions printed on the application form. Because the rater did not know where the schools were located, he placed a question mark on that part of the application and Hoang was not given credit for his education when he was assigned his rating. He was given an 87.5 rating for a GS-9 position and was deemed ineligible for a GS-11 position. The job Hoang desired was a GS-11.

In July of 1985, Hoang contacted the Office of Personnel Management in Indianapolis (OPM), one of the defendants in this case, and requested a review of his rating. In August he submitted to OPM his educational information complete with a World Education Services evaluation. This evaluation compares one's foreign education with its American counterpart and formulates results. The educational materials were forwarded to the Defense Contract Area Services Region (DCASR) for re-evaluation.

In the meantime, Hoang was sent a "Notice of Vacant Position" for a GS-9 position which he rejected. During that same month, Hoang was notified of his new ratings: 90 for GS-9 and 80 for GS-11. He again requested a review of his ratings. A position for contract administrator was vacant at this time and Hoang, with a rating of 80 was fourth in line for the job. A candidate with a ranking of 82.5 was selected. From January 27 to February 7, 1986, a position for Contract Administrator was again advertised. Defendants claim this did not represent an actual vacancy. The ad was placed in anticipation of future hiring needs which never materialized.

In March, 1986, plaintiff filed a complaint with OPM and the EEOC, alleging national origin discrimination. In May, he received his third set of ratings (put together by OPM this time, not DSCAR): 92.5 for GS-9 and 82.5 for GS-11. In addition, he was told that he would be given priority status for the next GS-11 position which opened. On June 30, 1986, OPM notified Hoang that his complaint of discrimination was rejected. He was informed that he could either appeal the administrative decision or he could file a complaint in U.S. District Court. Hoang filed a complaint based on employment discrimination under Title VII with this court on July 18, 1986. On July 24, 1986, Hoang received an "Inquiry as to Availability" for a contract administrator's job in Indianapolis. He indicated he was unavailable for a position in Indianapolis because he had decided to stay in Fort Wayne. OPM is apparently still willing to place Mr. Hoang when a vacancy for contract administrator opens up in Fort Wayne.

Apart from the substantial issues in this case, there has been a quagmire of procedural problems. Most of these have since resolved themselves, but a few remain. Hoang still insists that defendants should lose by default for failure to answer the complaint or the amended complaint. Hoang continues to bring this up in spite of the fact that it was resolved on December 24, 1986 by court order.

Hoang's latest motion asks that the court reconsider its grant of defendants' motion to supplement and substitute its exhibits after the filing deadline. Plaintiff had objected to the original exhibits (by filing a motion to strike) because they were not properly attested.

Plaintiff is acting pro se. He did not request appointed counsel but instead chose to represent himself.

An analysis of the legal issues in this case follows.

I.

The first issue that must be addressed is whether plaintiff Hoang established a prima facie case of employment discrimination. If he did not, the analysis need go no further. If he did, then defendants' position must be scrutinized.

The landmark case in the area of employment discrimination under Title VII is *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). That case established the requirements for a plaintiff's prima facie case in this type of action. The plaintiff must show (1) that he belongs to a minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that after his rejection, the position remained open and the employer continued to seek applicants with the same qualifications as plaintiff. Id. at 802. Applying these four requirements to Hoang's case, it is possible to conclude that he did establish a prima facie case. He is indeed a member of a national origin minority (southeast Asian). He did apply for a position as a Contract Administrator and was qualified for such position. He was rejected initially. The last requirement is more problematic. The first position for which he was rejected was indeed filled. A position was later advertised (Jan.-Feb. 1986) which was never filled. Indeed, defendants claim there was no actual vacancy -- they were merely soliciting applications for anticipated future hiring needs. After Hoang's rating

was adjusted up for the second time, he was invited to apply for a Contract Administrator's position in Indianapolis which he rejected.

If this last requirement can be considered satisfied, a prima facie case has been established.

II.

Assuming a prima facie case under *McDonnell Douglas* was established, the next issue is whether defendant succeeded in demonstrating that a legitimate reason existed for its refusal to hire plaintiff. This court believes that defendant has presented a legitimate reason for its action.

The Supreme Court of the United States expanded on *McDonnell Douglas* in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), by setting forth the sequence of proof required by plaintiff and defendant in a Title VII employment discrimination case. That sequence is as follows: (1) plaintiff must prove his prima facie case under *McDonnell Douglas* analysis; (2) if he establishes a prima facie case, the burden of production shifts to defendant who is only required to produce evidence of legitimate reasons for the challenged employment action; (3) if defendant can produce such reason(s), burden shifts back to plaintiff to demonstrate that the proffered reason is only a pretext and that the true reason for the decision was discrimination. Id. at 255-56. Has defendant met its burden of production? Defendant claims that Hoang failed to complete his application as clearly required on the face of the application. As a result, his rating was initially lower than it should have been. This in turn resulted in Hoang's not being considered initially for the position. Furthermore, when his rating was finally adjusted properly, he was offered an opportunity to apply for a job as Contract Administrator which he rejected due to its location. It should be pointed out that his application indicated that he was willing to locate anywhere in the country.

Defendant has therefore presented legitimate reasons for its failure to hire plaintiff.

III.

Is summary judgment proper in a Title VII hiring discrimination case?

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *accord, Arkwright-Boston Mfg. Mutual Ins. Co. v. Wausau Paper Mills Co.*, 818 F.2d 591, 593 (7th Cir. 1987). A material question of fact is a question which will be outcome-determinative of an issue in that case. *Big O Tire Dealers, Inc. v. Big O Warehouse,* 741 F.2d 160, 163 (7th Cir. 1984).

Recently the Supreme Court of the United States took the opportunity to address Rule 56 of the Federal Rules of Civil Procedure. In two cases decided on the same day, the Court has expanded the scope of the application of Rule 56. See, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). *Celotex* addressed the initial burdens of the parties under Rule 56, and *Anderson* addressed the standards under which the record is to be analyzed within the stricture of Rule 56.

After *Celotex* it is clear that a non-moving party may not rest on its pleadings to avoid summary judgment. *Celotex*, 106 S.Ct. at 2554. See also *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987). The initial burden is on the moving party to demonstrate "'with or without affidavits'" the absence of a genuine issue of material fact, and that judgment as a matter of law should be granted in the moving party's favor. Id. at 2553; *Arkwright-Boston,* supra at 593. Once the moving party

has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine [material] issue for trial.'" Id. Further, in *Anderson*, the Court held that what facts are material in a specific case shall be determined by the substantive law controlling that case or issue. *Anderson*, 106 S.Ct. at 2510. In addition, the Court went on to interpret Rule 56 as requiring that the courts analyze summary judgment motions utilizing the standard of proof relevant to that case or issue. Id., at 2512-2513. For recent academic insight into *Celotex* and *Anderson*, see *Childress, A New Era For Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183-194 (1987). At page 194 thereof, the author states:

> The recent Supreme Court cases likely require that summary judgment be more readily granted . . . . [t]his emerging trend signals a new era for summary judgments, one in which the old presumptions are giving way to a policy of balancing and efficiency, and the mechanism is more appropriate to double as a sufficiency motion -- allowing some sort of trial itself on the paper record.
>
> 116 F.R.D. at 194.

For the judicial epilogue of *Celotex*, see *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987).

Summary judgment may be proper in a case like this. Although courts must be very cautious in granting summary judgment in employment discrimination cases because motive often is the critical issue in such cases, this does not mean summary judgment is never appropriate. *Friedel v. City of Madison*, No. 86-3067, slip op. at 13 (7th Cir. Oct. 13, 1987); *Ballinger v. North Carolina Agricultural Extension Service*, 815 F.2d 1001, 1005 (4th Cir. 1987); *Grabb v. Bendix Corp.*, 666 F.Supp. 1223 (N.D. Ind. 1986). Where an employer has produced evidence of non-discrim-

inatory motive, the appropriate summary judgment inquiry is whether the evidence in the record could support a reasonable finding of discrimination. *Sorba v. Pa. Drilling Co., Inc.*, 821 F.2d 200, 203 (3rd Cir. 1987). However, in this circuit it is clear that a district court may grant defendant's summary judgment motion after defendant presents a legitimate, non-discriminatory motive for its employment decision even though such a grant denies plaintiff the opportunity to prove that defendant's reason was merely a pretext for discrimination. *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985)). The framework for evaluating proof established by *McDonnell Douglas* is merely a model for ordering evidence in employment discrimination cases. That model does not prevent the trial judge from searching for evidence of pretext in the evidence presented to establish the prima facie case. Such evidence does not exist here. Hoang has had abundant opportunity to present any such evidence through the pleadings and briefing procedure. He has failed to present direct or indirect evidence of discrimination. Summary judgment for this defendant is proper here.

IV.

Finally, this court must scrutinize plaintiff's procedural complaints to determine whether they have any merit. Plaintiff continues to insist he is entitled to a default judgment due to defendants' failure to answer his complaint or amended complaint. However, under Fed.R.Civ.Proc. 55(e), default judgment may not be entered against the United States "unless the claimant establishes a claim or right to relief . . . ."

Even if the court were permitted to ignore this rule (which of course it isn't), in the Seventh Circuit default judgments should only be employed in "extreme situations" where the defendant has no reasonable explanation for its conduct. *Passarella v. Hilton International Co.*, 810 F.2d 674, 677-78 (7th Cir. 1987). Here, the defendant at least has an explanation for its failure to answer (improper service).

Plaintiff also has motioned the court to reconsider its grant of defendants' motion to substitute and supplement its exhibits after the filing deadline. The court clearly acted at its valid discretion in granting the motion. The court has broad discretion in most cases to extend deadlines for filing motions. Unless such discretion is abused, the plaintiff cannot complain. Plaintiff cites *Pfeil v. Rogers*, 757 F.2d 850 (7th Cir. 1985) to support his motion to reconsider. However, that case clearly states that, "[a]bsent an abuse of discretion, the trial court's determination of whether a continuance is justified will not be interfered with by an appellate court." Id. at 838 citing *Harris v. Pate*, 440 F.2d 315, 318 (7th Cir. 1971).

The parties to this action have had two hearings in open court before this judge, one on May 27, 1987 and one on October 14, 1987. At the second hearing, the court agreed to postpone its judgment until plaintiff had the opportunity to respond to defendants' requests for admissions. The court has received the response and has examined it, but finds that there is still no genuine issue of material fact which would preclude its ruling on the cross-motions for summary judgment. The record is now complete and the court may rule on such motions.

Conclusion

Under *Klein, supra*, a grant of summary judgment for defendant is proper. Hoang has presented no evidence to support his claim of discrimination. His procedural objections also have no apparent merit. Plaintiff's motion for summary judgment is DENIED. Judgment shall be entered for the defendant against the plaintiff. Costs assessed against the plaintiff. IT IS SO ORDERED.

DATED: November 2d 1987

Allen Sharp

CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

APPENDIX 3

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 21, 1989*

April 4, 1989

Before

Hon. RICHARD A POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

LIEU B. HOANG, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District
No. 87-2806 vs.	)	of Indiana, Fort Wayne Division.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al. Defendants-Appellees.	)	No. 86 C 268. Allen Sharp, Judge.

ORDER

Lieu B. Hoang appeals the entry of summary judgment in favor of the defendants in this action under Title VII

*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed.R.App.P.; Circuit Rule 45(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

of the Civil Rights Act, as amended by the Equal Employment Opportunity Act, 42 U.S.C. § 2000e et seq. Hoang sued the Defense Contract Administration Services Region ("DCASR") of the Defense Logistics Agency ("DLA") and the Office of Personnel Management ("OPM").[1] He alleged that he lost the opportunity to be considered for a position as a defense contract administrator because OPM deliberately assigned his application an incorrect rating. His suit rests on the contention that OPM acted on the basis of his national origin (Hoang is a United States citizen who was born and raised in South Vietnam).

Hoang first applied to be a contract administrator (GS-11) in June 1985. Unfortunately, on his application, he neglected to provide the addresses of his undergraduate university and law school. This oversight led the DCASR rater to place a question mark on the application (apparently indicating that the rater was unable to determine whether Hoang had attended accredited institutions).[2] Consequently, Hoang's educational credentials were not considered in fixing his ratings at 87.5 for a GS-9 position and unqualified for a GS-11 position.

When Hoang contacted the Indianapolis division of OPM in July 1985, a staff member advised him of the flaw in his application. The following month, he requested a review and submitted an evaluation from World Educational Services,[3] indicating that his education was equivalent to an American law degree.

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[1] The OPM is responsible for recruiting employees for the DLA. OPM uses DCASR raters to evaluate applications for DLA positions, since specialized knowledge is required to perform the evaluations. Evidently, the rating system determines candidates' eligibility for the various GS levels and assigns numerical values to their credentials.

[2] The application form Hoang completed emphasizes the importance of providing all requested information.

[3] World Educational Services is an accrediting agency that evaluates educational credentials and makes possible comparisons among institutions in different countries.

While the review of his rating was pending, on about October 31, 1985, Hoang was notified of his eligibility for a position as a GS-9 contract administrator in Indianapolis. Before he responded to this notice, he learned the result of his re-evaluation: considering his education, DCASR had upgraded his rating to 90 for a GS-9 position and 80 for a GS-11 position. On November 22, he indicated that he did not wish to be considered for the GS-9 position, since it would represent a salary cut for him.

On November 26, Hoang's name, along with four others, was forwarded to DCASR in Fort Wayne to be considered for a GS-11 contract administrator position. The submitted materials reflected his revised rating of 80 for the position, which ranked him fourth among the four applicants. A few weeks later, Hoang was informed that he had not been selected; the candidate chosen had a rating of 82.5. The hiring decision had been made pursuant to a rule requiring the agency to choose from the three highest-rated applicants.

From January 27 to February 7, 1986, applications were solicited for another contract administrator position. The defendants explained that this advertisement did not represent a vacancy, but was placed in anticipation of future hiring needs that did not materialize.

On April 17, Hoang wrote to Steven Cohen, the regional director of OPM, again requesting that his rating be reviewed. His rating, reviewed this time by OPM staff, was revised to 92.5 (GS-9) and 82.5 (GS-11). The previous re-evaluation (placing him at 90 and 80) was termed an "erroneous judgment decision." OPM informed him that, because the error in his rating had cost him the opportunity to be considered for the previous position,[4] he would be placed first on the list of eligible applicants for the next open GS-11 contract administrator position. He was given this priority on the list.

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[4] His correct rating would have placed him among the top three applicants.

The following July, the Indianapolis office inquired of Hoang whether he wished to be considered for an open GS-11 position. Although he had initially expressed willingness to relocate, Hoang responded that he no longer wished to be considered for a job in Indianapolis, and had decided to remain in Fort Wayne. At the time of the district court's decision, he remained at the top of the register of applicants to be considered for the next available position in Fort Wayne.

The district court allowed that Hoang appeared to have established a prima facie case of discrimination, but found no evidence to rebut the defendants' proffered non-discriminatory reasons for not hiring him. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Accordingly, it denied Hoang's motion for summary judgment and granted the defendants' motion.

In order to establish a prima facie case under Title VII, a plaintiff must demonstrate the following: 1) the plaintiff belongs to a minority; 2) he applied and was qualified for a job for which the employer was seeking applicants; 3) he was rejected despite his qualifications; and 4) after his rejection, the employer continued to seek similarly qualified applicants. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973). Hoang's complaint appears to have established a prima facie case (although there may be room for argument regarding the fourth requirement, since the employer was seeking applicants, not for the same position, but to establish a roster for future vacancies). Once a prima facie case is established, the burden of production shifts to the defendants to give legitimate, non-discriminatory reasons for their refusal to hire the plaintiff. *Burdine*, 450 U.S. at 254-55. The defendants explain that Hoang was initially underrated because of his own failure to provide all of the information requested on the application form. Cohen's affidavit characterizes the second rating, which took into account Hoang's educational credentials but was still 2.5 points lower than the one he ultimately received, as an "erroneous judgment decision." Finally, Hoang was not

hired for the position in the Indianapolis office because he declined to be considered for a job at that location.

Hoang's response to the defendants' proffered non-discriminatory explanation for their actions is that there were so many misratings that they could not be mistakes, but must be a pretext for discrimination. Hoang offers nothing else to rebut the defendants' explanation. He speculates that the reason for the misratings was that the defendants did not want to believe that a Vietnamese person could be as good as an American. He does not challenge, but rather, explicitly accepts the defendants' description of the second underrating as an "erroneous judgment decision."

Summary judgment is appropriate against a plaintiff who fails to offer proof of an element of his case on which he will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 324 (1986). Although intent is at issue in employment discrimination cases, summary judgment is warranted against a plaintiff who sets forth "no indications of motive and intent supportive of his position." *Freidel v. City of Madison*, 832 F.2d 965, 972 (7th Cir. 1987) (quoting *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985)). In this case, the ultimate burden of proof was on Hoang to demonstrate discriminatory intent in the defendants' actions. *Burdine*, 450 U.S. at 253; *EEOC v. Sears, Roebuck and Company*, 839 F.2d 302, 309 (7th Cir. 1988).

Hoang offered only speculation with respect to the intent element of his claim. Speculation and conclusory allegations do not establish an issue of fact for trial. *Powers v. Dole*, 782 F.2d 689, 695 (7th Cir. 1986); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 283 (7th Cir. 1985). Hoang seems to base his claim upon the incorrect assumption that an error in judgment by the DCASR rater is sufficient to establish liability. Title VII does not, however, provide liability for simply erroneous or arbitrary decision. *Freidel*, 832 F.2d at 973.

Hoang also alludes to a number of alleged procedural irregularities in the district court proceeding. In particular, he challenges the district court's decision to allow the defendants, after the filing deadline, to substitute certified copies of exhibits submitted with their summary judgment motion. Hoang moved to strike the exhibits originally submitted because they were not certified copies, as required by Fed.R.Civ.P. 56(e). The defendants, in response, asked and were allowed to substitute certified copies. Hoang contends that this decision constituted an abuse of discretion. Although the requirements of Rule 56(e) are mandatory, and non-complying materials must be excluded from consideration during the pendency of the summary judgment motion, see *Freidel*, 832 F.2d at 970-71, the district court in this case did not commit error that warrants a remand. Had the district court refused to consider the uncertified exhibits and denied the defendants' motion for summary judgment, the defendants could simply have re-filed the motion, submitting certified copies. Thus Hoang was not prejudiced by the district court's decision to allow the defendants to substitute the exhibits.[5]

Hoang also challenges the district court's "refusal to rule" on his motion to compel production of documents. When the defendants moved for summary judgment, however, Hoang did not request a continuance under Fed. R.Civ.P. 56(f). Instead, he filed a cross-motion for summary judgment. In the absence of a Rule 56(f) request, it is

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[5] Hoang also asserts that, because the defendants did not submit proper evidence of non-discriminatory reasons for their action, his own motion for summary judgment should have been granted. This argument is without merit, since Hoang's motion was insufficient to shift the burden to the defendants to demonstrate the existence of an issue of material fact. The burden only shifts to the non-movant when the moving party's motion demonstrates the absence of a material factual issue and entitlement to judgment as a matter of law. *Freidel*, 832 F.2d at 971. Hoang speculated, but offered no proof, that the defendants acted on the basis of his national origin. He also alleged that the second misrating was an "erroneous judgment decision." This argument did not entitle him to judgment under Title VII. Id. at 973. Thus, even disregarding the defendants' improperly presented evidence, Hoang's motion would not have been granted. See Id. at 973 (evidentiary failings undercutting nonmovant's response to summary judgment do not matter if movant's motion is insufficiently supported.)

not error for the district court to rule on a summary judgment motion. *Vachet v. Central Newspaper, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987).

Finally, Hoang contends that he was entitled to a default judgment against the defendants. This claim is foreclosed by Fed.R.Civ.P. 55(e), which bars a default judgment against the United States "unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." Hoang's submissions established no entitlement to relief; thus default judgment would have been improper.

For the foregoing reasons, the decision of the district court is AFFIRMED.[6]

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[6] Hoang alludes to other procedural matters, but does not sufficiently support his claims or identify the alleged errors by the district court. Accordingly, we will not consider these arguments on appeal. See *Ordower v. Feldman*, 826 F.2d 1569, 1576 (7th Cir. 1987) (argument merely mentioned without citations to authority not sufficient to raise issue before this court); *Bacon v. American Federation of State, Court, and Municipal Employees Council*, 795 F.2d 33, 35 (7th Cir. 1986) (plaintiff must present an arguable explanation of how the district court erred in its decision).

APPENDIX 4

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 11, 1989

Before

Hon. RICHARD A POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

LIEU B. HOANG, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 87-2806 vs.	)	
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al. Defendants-Appellees.	)	No. 86 C 268. Allen Sharp, Judge.

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.